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## Regional Human Rights Systems

Brittany West

*American University Washington College of Law*

Antonia Latsch

*American University Washington College of Law*

Jessica Alatorre

*American University Washington College of Law*

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# REGIONAL HUMAN RIGHTS SYSTEMS

## AFRICAN SYSTEMS

### CASE IN AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS CHALLENGES BARRIER TO INDIVIDUAL COMPLAINANTS

In a case against the African Union currently pending before the African Court on Human and Peoples' Rights, the Court is under pressure to clearly establish whether it has jurisdiction to hear cases brought by individual complainants regardless of whether the challenged State Party or international organization has accepted the Court's jurisdiction. In *Atabong Denis Atemnkeng v. African Union*, a Cameroonian employee of the African Union Commission seeks a declaration that Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights is contrary to the Constitutive Act (the Act) of the African Union, and to Articles 2, 3, and 7 of the African Charter. Article 34(6) requires that a challenged State acknowledge the Court's jurisdiction before an individual's case can proceed against it under Article 5(3). Atemnkeng argues that this requirement is inconsistent with Articles 2, 3, and 7, which guarantee equal enjoyment of the rights found in the Charter, equality before the law, and the right to have one's cause heard, respectively.

If the Court upholds the validity of Article 34(6), the Court may effectively deny individuals the right to have their causes heard in violation of Article 7. While individuals can currently bring cases before the African Commission on Human and Peoples' Rights, Atemnkeng alleges he was denied the justice he sought through the Commission. Furthermore, because Cameroon has not permitted the Court to receive individual complaints against it, Atemnkeng is barred from bringing a case against the country in the Court. Therefore, Atemnkeng has brought this case against the African Union (AU) to ask the Court to find Article 34(6) invalid, providing Atemnkeng, and other individuals, an alternative venue in which to receive justice for human rights violations by States.

The African Court issued an opinion in July 2012 in a case that also challenged the validity of Article 34(6). In *Femi Falana v. African Union*, the Court did not rule on the validity of 34(6) itself, but rather applied it to find that the Court lacked jurisdiction. The Court concluded that an individual complaint against the AU, a non-state entity that had not made a declaration pursuant to 34(6), was outside the scope of the Court's jurisdiction. Additionally, the Court concluded that the AU cannot be sued in the Court because, while the AU has separate legal personality, it is not a party to the Protocol.

The dissent, however, did find that the African Union could be sued because in addition to being a separate legal entity, organs of the AU can request advisory opinions of the Court. The dissent argued that Article 34(6) is contrary to the Charter because the Protocol, under Article 66 of the Charter, is meant to supplement the Charter in protecting and promoting human rights, but 34(6) instead effectively prevents the Court from addressing human rights abuses. However, the dissent determined that the Court did not have the authority to declare the Article null and void.

In light of the *Falana* decision, it is still uncertain how the Court will decide Atemnkeng's case. With two new judges on the Court, Ben Kioko and El Hadji Guissé, it is possible that a majority could agree with the dissent in *Falana* and find that Article 34(6) is contrary to the Charter and individual complainants cannot be barred under it. While Kioko and Guissé both replaced judges who sided with the majority in *Falana*, the possibility of a change appears unlikely considering that Kioko, in his previous role as Legal Counsel for the African Union Commission, represented the AU in *Falana*.

At stake in *Atemnkeng* is a clear establishment of the Court's jurisdiction and individual complainants' ability to challenge human rights abuses in the Court. Individuals can currently bring cases to the Commission, but as Atemnkeng alleges, this avenue does not always provide justice for individuals. Unlike the Court's rulings,

decisions of the Commission are not binding, and while the Commission can recommend individual cases to the Court, bypassing Article 34(6), it is often slow to deal with cases causing individuals to wait years. Without a direct venue in which to address human rights abuses, individuals in the forty-nine states that have not made a declaration accepting jurisdiction under Article 34(6) do not have equal access to justice. Furthermore, if the Court decides that the AU cannot be sued because it is not a party to the Protocol, as the majority decided in *Falana*, stakeholders will not be able to hold the AU accountable for its actions or inaction in protecting and promoting human rights.

### ECOWAS COMMUNITY COURT OF JUSTICE FOCUSES ON EFFECTIVE IMPLEMENTATION

In an effort to combat an estimated sixty percent noncompliance rate with the decisions of the Community Court of Justice (ECCJ), the adjudicatory body of the Economic Community of West African States (ECOWAS), ECOWAS announced a new focus on effective implementation of ECCJ decisions for its new legal year, which began in September 2012. Individuals who seek redress for human rights violations in the ECCJ do not necessarily receive justice with a final ruling from the court; the State Party needs to take steps to carry out the decision. For example, in *Musa Saidykhan v. The Gambia* in 2010, the ECCJ ruled in favor of a tortured journalist, granting damages and finding violations of the African Charter on Human and Peoples' Rights (African Charter) under Article 5, prohibition against torture; Article 6, the right to personal liberty; and Article 7, the right to a fair trial. Gambia has yet to make the necessary declarations or pay restitution as ordered by the Court.

The Chief Registrar of the ECCJ, Tony Anene-Maido, credits the unwillingness of Member States to comply with ECCJ decisions as the source of the lack of confidence in the Court. Adding to the issue is the effect of noncompliance in other Subregional Economic Communities

(SECs), which adds to ECCJ Member States' worries over the ECCJ's effectiveness. The Southern African Development Community (SADC) Tribunal was suspended after Zimbabwe refused to comply with its decision that found Zimbabwe's land reform program discriminatory in violation of the SADC Treaty. While the Tribunal is suspended, its previous decisions are also suspended. With this background demonstrating the possibility of a similar fate for other SECs, Member States have expressed doubt regarding the effectiveness of the ECCJ.

The work of the States in developing implementation mechanisms is a crucial element in the ECCJ's ability to protect human rights in the region. Originally designed to interpret the ECOWAS Treaty and hear contentious cases brought by Member States and institutions on Community Law, the ECCJ now also hears cases brought by individuals on contentious issues, including human rights violations, since the passage of the 2005 Supplementary Protocol to the Treaty. The ECCJ applies international human rights treaties that have been ratified by the States Parties, including the African Charter, which all fifteen ECOWAS Member States have ratified. However, the ECCJ depends on national implementation mechanisms set up in accordance with Article 24 of the Supplementary Protocol. Three states have complied with Article 24: the Republic of Niger, Nigeria, and the Republic of Guinea. However, even those States with a national mechanism in place have not uniformly enforced all of the ECCJ's decisions.

ECOWAS, as a SEC, overlaps with the jurisdiction of the African Union, the pan-African international organization that provides complainants alternative forums in which to bring their case. All ECOWAS States Parties are subject to the jurisdiction of the African Commission on Human and Peoples' Rights (the Commission), and nine of the fifteen ECOWAS Member States have ratified the protocol establishing the African Court on Human and Peoples' Rights (the Court). There are certain factors that may make the ECCJ a more favorable venue for an individual complainant. Individuals cannot bring their cases before the Court unless their State has agreed to its jurisdiction, and the Commission can be slow to hear complaints. Further, exhaustion of local remedies is a requirement of the Court and the Commission but not the

ECCJ. Finally, while the Commission and the Court implement the African Charter, the ECCJ implements the African Charter as well as other international human rights instruments ratified by the State involved.

The ongoing lack of implementation by State Parties makes the new focus on implementation crucial. Nigeria announced in June 2011 the new position of Minister of Justice as the national authority charged with implementation of ECCJ decisions, but Nigeria has yet to effectively utilize the mechanism. If Member States still do not implement ECCJ judgments, even with national implementation mechanisms in place, future complainants may not have the confidence to utilize the ECCJ. Furthermore, States that do not implement ECCJ decisions deny past complainants, like Musa Saidykhan, the remedies promised to them. Complainants can still turn to the Commission or the Court, but they may be effectively barred from those organs if their state has not accepted jurisdiction of the Court or their complaint is grounded in an international document other than the African Charter.

*Brittany West, a J.D. candidate at the American University Washington College of Law, is a staff writer for the Human Rights Brief.*

## EUROPEAN SYSTEM

### ECTHR BECOMES THE FIRST INTERNATIONAL COURT TO RULE ON CIA RENDITION PROGRAM

The Grand Chamber of the European Court of Human Rights (ECTHR) on December 13, 2012, found Macedonia liable for Khaled El-Masri's torture and other violations in a case connected to the U.S. Central Intelligence Agency's (CIA) program of extraordinary rendition. In 2003, Macedonian intelligence agents apprehended and detained El-Masri before handing him over to the CIA, the Court found. Nine years later, in May 2012, El-Masri filed the complaint to the ECTHR alleging unlawful abduction and mistreatment by the Macedonian Ministry of the Interior. The case, *El-Masri v. The former Yugoslav Republic of Macedonia*, marked the first time an international human rights court considered the merits of a claim related to the participation of a European state in the U.S.-led renditions program. The decision by the Grand Chamber

of the ECTHR found Macedonia liable for violations of the European Convention on Human Rights' (ECHR) Article 3 (torture and inhuman or degrading treatment) for two counts, Article 5 (liberty and security), Article 8 (respect for private and family life), and Article 13 (effective remedy). More broadly, the decision added jurisprudence on the scope and extent of state responsibility under the ECHR for involvement in extraordinary renditions carried out by states not party to the Convention.

El-Masri, a German national of Lebanese descent, asserted in his petition that Macedonia held and interrogated him for twenty-three days before handing him over to the CIA for interrogation in Afghanistan concerning suspected links to al-Qaida. He claimed that the CIA detained him "incommunicado" with no communication to the outside for more than four months until setting him free in Albania after the CIA determined El-Masri had been confused with a similarly named terrorism suspect.

The Grand Chamber found Macedonia liable on all charges brought by El-Masri. The first count under Article 3 relates not just to his inhuman treatment during detention by the Macedonian government, but also for the further risk Macedonia put him under by releasing him to the CIA. The court significantly held the case was not just important for El-Masri but for other victims of similar crimes and found a second violation of Article 3 for the State's failure to adequately investigate.

The ECTHR previously ruled in *Osman v. United Kingdom*, that a state is responsible when it "knew or ought to have known" that there was a real and immediate risk to rights protected by the ECHR, and the State failed to "take measures within the scope of [its] powers." The ECTHR in El-Masri's case likewise determined that Macedonia "knew or ought to have known" because the reports of the actions of the CIA, which the Court stated were manifestly contrary to the ECHR, were known at the time.

In addition to Article 3 violations, the Court found that El-Masri's twenty-three-day detention by Macedonian authorities along with his transfer to CIA agents violated his Article 5 ECHR right to liberty and security of person. Section 2 of Article 5 allows only lawful arrest or detention, prohibiting secret and arbitrary detention

and disappearance. The Court found that he was outside the legal framework during his detention, had no access to any court where he could challenge his detention, and it should have been clear to the Macedonian authorities that he faced a risk of violation of his rights by the CIA.

The Court also found that El-Masri had been denied respect for his private and family life during the time of his detention and that, in conjunction with all the other violations, there had been a violation of Article 13 because there had been no effective criminal investigation, which consequently also burdened his ability to seek civil remedies. Article 13 of the ECHR provides a right to effective remedy in national courts for violations of ECHR rights. The remedy required by Article 13 must be effective in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent state.

The Court's decision was a significant finding on the legal remedies for the ECHR States Parties' involvement in the U.S.-led renditions program. Despite any tension it might cause with the United States, the Court made clear its disapproval of State Party's involvement with the CIA program and was especially critical of the lack of investigation because it hindered both other victims and what the Court considered the general public's right to know what happened. In a complex case involving the "War on Terror" and delicate interactions among nations, the Court found the rights of the individual must still be honored. Individuals have thus far struggled to bring successful challenges in U.S. courts or any other arena against the U.S. government, but the Court's decision creates an option that, at least when ECHR States Parties are involved, there may be a viable option for legal challenges.

#### ITALY'S EMBRYO SCREENING BAN BREACHED COUPLE'S RIGHT TO PRIVACY

The European Court of Human Rights (ECtHR) delivered its judgment in the bioethics case of *Costa and Pavan v. Italy*, holding the State responsible for violating Article 8 of the European Convention on Human Rights (ECHR) by prohibiting pre-natal diagnosis of genetic diseases. The ECtHR found in its August 10, 2012, decision that the Italian Law on Human

Assisted Reproduction violated the right to privacy by creating inconsistent and disproportionate interference in the applicants' lives by denying them access to embryo screening but authorizing medically assisted termination of pregnancy when the fetus showed symptoms of the same disease.

With the help of *in vitro* fertilization and genetic screening, the applicants, both carriers of cystic fibrosis, wanted to avoid transmitting the disease to their offspring. Because the Italian law prohibits pre-implantation diagnosis, their only option was to conceive and medically terminate it if the fetus tested positive for the disease. The couple argued that not being able to access genetic screening to select an embryo unaffected by the disease was a violation of Articles 8 and 14 of the ECHR.

Article 8 of the ECHR offers general protection of a person's private and family life, home, and correspondence against arbitrary interference by the State. Section 2 of Article 8 specifies that public authority cannot interfere with this right unless it "is in accordance with the law and is necessary . . . for the protection of health or morals, or for the protection of the rights and freedoms of others." The Italian government did not dispute that the law fell within the scope of Article 8; however, it argued that the ban legitimately intervened to protect the health of mother and child, the doctor's conscience, and the public interest to prevent eugenic selection.

In its ruling against Italy, the Court highlighted "the incoherence of the Italian legislative system that only bans the implantation of healthy embryos while allowing the abortion of fetuses with genetic conditions" and found the law disproportionate, in breach of Article 8 of the ECHR. The ruling is consistent with a previous decision by the Court in *S.H. v. Austria* upholding a law prohibiting *in vitro* fertilization, on the grounds that there was no European consensus to consider it a protected human right, but the decision allowed for an exception, as was found in the *Costa and Pavan* case, where the public interests do not outweigh the private ones. Also like in the *S.H.* case, the Court in *Costa and Pavan* declined to enter into bioethical issues and instead restated the importance of proportionality.

The Court found in 2007 that the right of a couple to make use of *in vitro* fertilization to conceive a child can be protected

by Article 8 as an expression of private and family life. The case concerned two Austrian couples who wanted to conceive a child through *in vitro* fertilization but were denied access by Austrian Law. *Costa and Pavan v. Italy* broadened the scope of private and family life provided protection under Article 8 by including the desire to have a child born healthy and without genetically transmissible diseases. By identifying the parents' wish with their right to privacy, the Court projected the concept of Article 8 as a right of individual will in social order. Thus, the desire to have a child free from disease constitutes an aspect of the right to privacy granted by Article 8. The Court held the notion of "private life" to be a broad concept inclusive of the right to respect for one's decision to have or not to have a child. Furthermore, the Court observed that the terms "child" and "embryo" must not be confused, opposing the government's argument that the ban legitimately intervened to protect the health of the child. Accordingly, to avoid any deviation in the field of eugenics and to protect the freedom of conscience of medical personnel, the term "child" would not apply.

The majority of European countries allow some form of *in vitro* fertilization to avoid the inheritance of genetic diseases. Twelve European countries have yet to establish laws regulating *in vitro* fertilization. The Court's decision in this case sets binding precedent for all Council of Europe members. Although the Court has taken a stand on the relevance of reproductive medicine to the protection of private and family life, it remains unclear how *in vitro* fertilization can or should be protected by the European Human Rights System.

*Antonia Latsch, an L.L.M. candidate at the American University Washington College of Law, is a staff writer for The Human Rights Brief*

#### INTER-AMERICAN SYSTEM

##### VENEZUELA SEEKS TO WITHDRAW FROM THE INTER-AMERICAN COURT OF HUMAN RIGHTS

After months of speculation, Venezuela has taken a decisive move to cut ties with the Inter-American Court of Human Rights (IACtHR) by withdrawing from the American Convention on Human Rights (American Convention). On September



6, 2012, Venezuela formally notified the Secretary General of the Organization of American States (OAS) of its intent to withdraw. Venezuelan officials have accused the Court of acting as a puppet to United States interests and of meddling with Venezuela's national sovereignty. Recent decisions by both the IACtHR and the Inter-American Commission on Human Rights (IACHR) drew derision from Venezuela.

In July, Venezuelan President Hugo Chávez reiterated statements made a few months earlier that the country would withdraw after the Court issued a decision in *Díaz Peña v. Venezuela* that required Venezuela provide compensation for the inhumane detention of Raúl José Díaz Peña. That same month, the Commission sent another case to the Court, *Hermanos Landaeta Mejías v. Venezuela*, citing Venezuela's failure to comply with its recommendation that the alleged arbitrary detention and extrajudicial killings of the Mejías brothers be fully investigated. Through its reports, the Commission has expressed concern about political intolerance, restriction of free speech, impunity for human rights violations, and has highlighted the Venezuelan government's reluctance to allow the Commission to conduct observation visits for the past ten years. Most recently, the IACHR urged Venezuela to investigate reports of a massacre of the Yanomami indigenous people last year by illegal Brazilian miners inside Venezuelan borders. One day later Venezuela formally notified the OAS of its intent to withdraw from the Convention.

The IACtHR provides the last recourse of judicial review in the Inter-American System for violations of human rights by states in the Americas region. In order to be bound by IACtHR decisions, a State must first ratify the American Convention and then, pursuant to Article 62 of the American Convention, declare that it recognizes the Court's decisions as binding. Venezuela ratified the American Convention in 1977 and declared intent to be bound by the IACtHR's jurisdiction in 1981. Once the Court's jurisdiction has been recognized, only denouncing the entire American Convention can remove the State from the IACtHR's reach. To denounce the American Convention and the Court's jurisdiction, Article 78 of the

Convention requires countries to submit official notification to the OAS of their withdrawal one year in advance. Thus, Venezuela is required to abide by the Court's decisions until the staying period expires. During this time, the Court can continue to receive and hear cases, and any case pending at the end of the year will continue its proceedings.

Even after a State Party denounces the American Convention, the Commission can still monitor human rights in that country if the State is a party to the American Declaration on the Rights and Duties of Man. Under the current model, if Venezuela fails to comply with findings, the Commission retains the option to forward a case to the Court to put additional pressure on a State that has failed to adhere to its human rights obligations. Moving forward, the Commission will be able to hear individual petitions against Venezuela for human rights abuses; however, there will no longer be a legally binding mechanism to uphold decisions against it. The only way Venezuela could completely remove itself from the Inter-American Human Rights System would be to formally withdraw from OAS membership; thus far Chávez has denied he will do this.

Venezuela's decision elicited concern among human rights advocates, including a regional coalition of civil society organizations that called on Venezuela to reconsider. In a joint statement they wrote, "The potential withdrawal of Venezuela would severely undermine the protection of human rights in this country, and would eliminate the last recourse to justice available to those who have suffered human rights abuses." An additional concern is whether Venezuela's actions may encourage other States to reconsider their own ratification of the Convention and the Court's jurisdiction. Ecuador has also openly threatened withdrawal. To date, Trinidad and Tobago is the only State to ratify, and then completely withdraw from the Convention. Other countries, such as Peru, began the formal withdrawal process and then reversed the decision when a new administration took office. Whether Venezuela will reevaluate and uphold the importance of human rights bodies in the Americas remains to be seen. For the next year, the collective system remains intact.

## HUMAN RIGHTS COURT HANDS ANOTHER VICTORY TO INDIGENOUS AND TRIBAL COMMUNITIES

From the Belo Monte dam in Brazil, the Yanacocha gold mine in Peru, and oil exploration activities in the Ecuadorian Amazon, the rights of indigenous and tribal peoples stand in sharp contrast with the often pro-development stances of national governments in the Americas that grant concessions and allow corporations to build, dig, and drill. In June 2012, the Inter-American Court of Human Rights (IACtHR) reaffirmed in *Kichwa Indigenous People of Sarayaku v. Ecuador* that States must engage in prior consultation with indigenous communities before a project begins on their ancestral lands.

In the 1990s, Ecuador granted a concession for oil exploration in Block 23 of the Amazon to PetroEcuador, the state petroleum company, and CGC (*Compañía General de Combustibles S.A.*), an Argentinian oil company. The Kichwa community of Sarayaku, numbering 1,200 people, whose territory covers two-thirds of Block 23, alleged that it was never consulted and that the community continually opposed the oil-related activities.

Seeking redress for the lack of consent, in 2003 the Sarayaku community submitted a petition to the Inter-American Commission on Human Rights (IACHR). An important element of the complaint was the introduction of explosives on and below their land for seismic testing. The Commission requested provisional measures to protect the community, which the Court granted. When Ecuador failed to implement the measures, the Commission submitted the merits case to the IACtHR. For the first time in its history, the Court sent a delegation of representatives to the affected community in Sarayaku to gather additional information and held an *in situ* proceeding. Secretary for Legal Affairs of the Presidency of Ecuador, Dr. Alexis Mera, acknowledged full state responsibility for the lack of consultation and offered to compensate the Sarayaku community.

Ruling in favor of the Sarayaku, the Court cited violations by Ecuador of the American Convention on Human Rights (Convention). The Court pointed to violations of the right to prior consultation, the right to communal property, the right to

life, the right to humane treatment, and the right to an effective remedy. In its decision the Court cited International Labor Organization (ILO) Convention 169, which addresses the rights of indigenous and tribal peoples and to which Ecuador is a party. It also noted that Ecuador's constitution recognizes the right to prior consultation and establishes that affected communities should share in earned profits and receive compensation for cultural and environmental damages. The Court specified that consultation should occur prior to the project beginning, that the state must make a *good faith* effort to obtain consent, and that consultation procedures must be *adequate and accessible* to the particular community. In addition, the Court ruled that the required environmental impact assessment in *Sarayaku* failed to gather input from the community, was not independent from the oil company, and failed to take into account social, spiritual, and cultural effects of oil activities on the Sarayaku. The Court ordered Ecuador to ensure the explosives, which are still underground and pose a potential

threat to community members, are deactivated. Additionally, the Court ordered that Ecuador legislate a clear law on consent, pay damages to the community, and ensure effective consultation procedures. The Court was careful in saying that *Sarayaku* did not place an outright ban on development activities on indigenous land; rather, the decision focused on the lack of proper prior consultation and linked other violated rights to this lack of exchange with the community.

The *Sarayaku* decision came five years after another pro-indigenous and tribal rights decision by the Court in *Saramaka People v. Suriname*. In *Saramaka*, the Court considered whether a tribal or indigenous group was entitled to collective title of its property and, if so, whether the State must ensure it has the community's consent before granting concessions to develop the natural resources located within its territory. The Court ruled that there is a strong link between a tribal or indigenous community and the land and natural resources that secure its survival. Thus, because the

Saramaka people traditionally harvested and sold timber, a concession for logging could not be granted to a third party until the community gave free, prior, and informed consent.

The two decisions are especially important as governments throughout the region wrestle with a pro-development and investment agenda, and the rights of indigenous and tribal communities. *Saramaka* set a broad stage for indigenous rights and explicitly linked the impact of industry on a community's rights, environment, cultural wellbeing, and livelihood, thus requiring prior consultation and consent from a community. In *Sarayaku* the Court's opinion rested on *Saramaka*, but focused on the lack of proper prior consultation. While both decisions give a boost to indigenous rights, their full effect is still unraveling in Ecuador and Suriname alike.

*Jessica Alatorre, a J.D. candidate at the American University Washington College of Law, is a staff writer for the Human Rights Brief.*

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